 new FOIA

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TO: Ira Glasser and Burt Neuborne

FROM: Mark Lynch

This memo responds to the portions of Meir Westreich's memos of July 31 and August 31 1984, concerning the judicial review provisions of H.R. 5164. For ease of reference, the judicial review provisions, section 701(f), and the corresponding portion of the House Intelligence Committee's report are attached. Indeed, a careful reading of these materials answers many of Mr. Westreich's concerns.

Before discusssing the specific judcial review provisions of H.R. 5164, it is important to address one of Mr. Westreich's fundamental points that this bill establishes dangerous precedents that threaten judicial review in litigation involving constitutional rights. The problem with this point is that it assumes that the scope of judicial review and the amount of discovery are uniform in all types of litigation. Particularly with respect to review of agency administrative action, not involving constitutional rights, judicial review is often deferential and discovery is correspondingly limited. H.R. 5164, like the FOIA, provides for unusally searching judicial scrutiny of administrative action, as demonstrated below. But even judicial review and discovery under the bill it were as circumscribed as Mr. Westreich suggests, the adoption of special procedures for very limited and specialized issues concerning the CIA's filing system simply has no relevance to other types of litigation. Thus, to suggest that H.R. 5164 will be a precedent in cases involving constitutional rights confuses apples and oranges. I certainly agree that Harlow v. Fitzgerald has created serious problems in constitutional tort litigation, but the judicial review provisions of H.R. 5164 are simply irrelevant to those problems.

Also before addressing Mr. Westreich's specific comments on the judicial reivew provisions, it may be useful to review how they evolved. The bill which was originally introduced in the Senate by Senator Goldwater contained no mention at all of judicial review, and we assumed that the judicial review provisions of the FOIA would govern. Therefore, we were startled when the CIA announced at the first public hearing on the bill before the Senate Intelligence Committee in June 1983 that in the Agency's view the bill did not authorize any judicial review. We immediately denounced this position and made clear that without de novo judicial review the bill was unacceptable. In response to our position, the Senate Intelligence Committee modified the bill to provide for some judicial review. Although we won the principle that judicial review was imperative, the hastily drafted provision in the Committee's bill was ambiguous and still unacceptable.

When the House Intelligence Committee held hearings on the bill in February 1984, judicial review was a central issue. At that point, the CIA, having already agreed to the Senate provision, had accepted judicial review in principle but had not yet agreed to any details beyond those in the Senate bill. In response to our detailed criticism of the Senate provision, the House Committee instructed its staff to negotiate a judicial review provision that would be an improvement over the Senate provision and acceptable to both the ACLU and the CIA. During the intensive discussions that followed, the precise nature of the issues that could arise under the bill became clearer, and problems were identified that would be unique to this legislation. This bill, of course, does not involve disclosure of documents but access to files, and much information about the Agency's filing system is itself exempt from disclosure under exemptions 1 and 3 to the FOIA and two separate statutes regarding CIA information. 50 U.S.C. §§ 403(d)(3) and 403g.

Our guidelines for agreeing to the various provisions were that we would accept no provisions that restricted current litigation practices for existing issues and would accept new procedures for dealing with novel issues only if they were reasonable and consistent with the bill's purposes. As bargaining chips in this negotiation we were willing to codify certain practices, discussed below, that have become so well established by the courts in FOIA litigation with the CIA that there is no reasonable possibility that they will be changed in future litigation or through legislative amendment. It should be evident to anyone who considers our position on this bill that we, as the most active litigants with the CIA, would not agree to any provisions that would undermine our present position. As demonstrated below, section 701(f) of H.R. 5164 meets the

standards we set for ourselves.

Mr. Weistreich's first memo makes numerous assertions about H.R. 5164 without reference to any specific portions of the bill, and the memo also reflects a large degree of misunderstanding about the provisions of the bill. Therefore, rather than attempt to address his points seriatim, this response can be best presented by going through each one of the judicial review provisions, explaining why they are acceptable, and where relevant responding to Mr. Westreich's comments.

Section (f) begins by stating that "[w]henever any person who has requested agency records under [the FOIA] alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that -- [paragraphs (1) - (7)]." Section 552(a)(4)(B) is the section of the FOIA that provides for de novo review and places the burden of proof on the agency.

Thus, section (f) states the general rule that issues arising under H.R. 5164 will be reviewed as any other FOIA issue, subject only to the limitations set forth in the following seven paragraphs. Mr. Weistreich argues that this general rule is meaningless because paragraphs (3) and (4), cited and discussed below, "cover the entire gamut of issues" that can arise under H.R. 5164. This assertion is mistaken because paragraph (3) deals only with improper placement of a document solely in an operational file (as, for example, where an intelligence report is stored solely in an operational file and not in a non-operational file where it should be) and paragraph (4) deals only with the improper exemption of a file as operational. The most common and important issues that will arise under this bill are whether specific documents meet one of the exceptions set forth in section 701(c) that require a search of operational files -- i.e., whether records responsive to first person requests are located in operational files, and whether requested records concern the subject matter of an investigation or a covert action the existence of which is not properly classified. These issues are not encompassed by paragraphs (3) and (4), and therefore they are not subject to any of the restrictions imposed on litigation of issues arising under those two paragraphs.

The House Intelligence Committee Report also reinforces the point which is evident from the structure of section (f) that paragraphs (3) and (4) do not include all the issues which can arise under H.R. 5164: "Matters not addressed by paragraphs 701(f)(1) through (7) will continue to be decided in accordance

with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience." This statement would be meaningless if paragraphs (3) and (4) subsumed all the issues, such as those arising under section 701(c), that will arise under the bill.

Paragraph (1) provides that "in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court." This means that counsel for plaintiff will not have access to any classified information which may be filed in support of the agency's position. Courts routinely permit the CIA to file classified affidavits, and sometimes the requested documents, when necessary to carry its burden of proof.*/ No court has ever permitted counsel for plaintiff to examine such information, despite our repeated efforts to permit such participation in in camera proceedings.**/ Indeed, Judge Harry Edwards, joined by Judge Luther Swygert, recently held "[i]t is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requesters' counsel to participate in an in camera examination of putatively privileged material." Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983). Although this ruling came in a dispute over discovery rather than under the FOIA, we believe that this ruling from two liberal judges, combined with our previous lack of success, forecloses any realistic chance to obtain the participation of plaintiff's

*/E.g., Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

**/E.g., Salisbury v. U.S., 690 F.2d 966, 973 (D.C. Cir. 1982); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Colby v. Halperin, 656 F.2d 70 (4th Cir. 1981); Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

counsel in in camera proceedings under the FOIA. Accordingly, we do not believe that paragraph (1) detracts from any right we now have or reasonably might expect to have in the future.

Paragraph (2) provides the "the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties." Mr. Westreich makes a great deal of the fact that in "normal federal litigation," courts decide cases on the basis of evidentiary hearings. While that is true, there has never been an adversarial evidentiary hearing in any FOIA case involving national security information*/ and relatively few such hearings in other FOIA cases.**/ After ten years of extensive experience under the Act as it was amended in 1974, the judicial preference for deciding factual issues in FOIA cases on written submissions is well-established.***/ If anything, paragraph (2) gives us ammunition to argue for evidentiary hearings since it contemplates that in some situations a decision on written submissions is not practicable. Indeed, the House Intelligence Committee Report states:

> [C]ases will arise in which a court will find it impracticable to decide such issues based on sworn written submissions. Paragraph 701(f)(2) does not place obstacles in the path of the court in obtaining information it needs to decide these issues. Thus, when necessary to decision, the court may go beyond sworn written submission to require the Agency to produce additional information, such as live testimony, or the court may examine the contents of operational files.

*/In a few cases, courts have heard agency officials ex parte in camera.

**/Most of the few trials that have been conducted in FOIA cases have involved exemption (b)(4) where the issue is whether commercial or financial information submitted to the government would cause competitive harm to the submitter if released under the FOIA.

***/It should be noted that paragraph (2) is limited to decisions on issues of fact and therefore will not change the practice of hearing oral argument on legal issues presented on motions for summary judgment.

Mr. Westreich also mistakenly contends that paragraph (2) abolishes the right to discovery. The only limitation on discovery is in paragraph (5) which is limited to the specific issues arising under paragraphs (3) and (4). The House Intelligence Committee Report is quite clear that the limitation in paragraph (5) has no effect on discovery with respect to issues other than those raised under paragraphs (3) and (4):

> The specific provision concerning the issue of discovery in the context of the issues of improper placement of records and improper exemption of files is not intended to carry a negative implication that discovery on other issues is to be either especially encouraged or discouraged in any manner by this subsection. The question of discovery with respect to other issues shall continue to be governed by the practices developed by the courts under the judicial review provision of the Freedom of Information Act (5 U.S.C. 552(a)(4)).*/

As noted above, paragraphs (3), (4), and (5) deal only with two issues that will arise under H.R. 5164 -- i.e., whether documents are withheld because they have been improperly placed solely in exempt operational files and whether files have been improperly exempted as operational. Although these paragraphs alter the procedures that are followed with respect to existing issues, they are consistent with the overall purpose of H.R. 5164 and do not, contrary to Mr. Westreich's assertions, render the provisions of the bill unenforceable.

Paragraph (3) provides "when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence." If a plaintiff could make a bare allegation that a record has been improperly placed in an exempt operational file, the CIA would be required to search the entire file in order to respond

*/Mr. Westreich is mistaken when he asserts that discovery is "perfunctory" in FOIA cases with the CIA. In response to a complaint, the Agency files a motion for summary judgment supported by affidavits to carry its burden of proof under the FOIA. In nearly every case where a plaintiff attempts to take discovery, the Agency files a motion for a protective order arguing that its affidavits are sufficient for the court to rule. Thus, in practice, because the CIA routinely responds to discovery requests with motions for a protective order, the plaintiff must convince the court that discovery is necessary.

to the allegation. If file searches could routinely be required on the basis of bare allegations, one of the purposes of the bill -- to relieve the CIA of searching operational files -- would be defeated. Thus, paragraph (3) requires something more than a bare allegation; the allegation must be supported by a sworn written submission or otherwise admissible evidence in order to trigger the search.

In practice this means that a plaintiff cannot allege improper placement on the basis of a hunch or generalized suspicion; he must be able to point to some evidence of improper placement. This requirement is no different from current practice, for courts do not require the CIA to expand its search for documents on the bare allegation that some are being hidden from the scope of a routine search. E.g., Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980). Although a sworn written submission based on personal knowledge would be the strongest support for such an allegation of improper placement, paragraph (3) does not require a verified complaint. Any admissible evidence will do. For example, if the Agency releases documents from non-operational files which refer to other documents which have not released, that would be evidence that the documents yet to be released are improperly located in operational files. This provision does not, as Mr. Westreich asserts, require a plaintiff to prove his case conclusively before filing it, but only requires that he have solid support for his case.

Paragraph 4 provides:

> (A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and
>
> (B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence.

This paragraph establishes a procedure for dealing with allegations that a file which has been exempted as operational does not in fact meet the definitions for operational files. It does not deal with the requirements for a plaintiff to support an allegation, as does paragraph (3), but rather deals with

the showing required by the CIA to respond to an allegation that a file has been improperly exempted as operational. Subparagraph (A) provides that in the first instance, the CIA does not have to file a document-by-document description of a file in order to demonstrate that a file is operational within the meaning of section 701(b), but can meet its burden by filing affidavits that files likely to contain records responsive to an FOIA request currently fit the definition of operational. This provision insures that the Agency cannot meet its burden by demonstrating that the file at sometime in the past was designated operational, as the CIA wanted, but must demonstrate on the basis of a current review made in the context of the litigation that the file meets the definition. Since these sworn submissions will be submitted in support of motions for summary judgment that a file is properly exempt, they will have to meet the personal knowledge requirement of Rule 56(e), and there is no basis for Mr. Westreich's assertion that the Agency is relieved of this requirement or that the bill creates a double standard between the Agency and plaintiffs.

Subparagraph (B) provides that after the Agency has made its initial showing under subparagraph (A), the court can order the Agency to perform a document-by-document review of the file if the plaintiff controverts the Agency's initial showing through an affidavit or other admissible evidence. This provision merely codifies existing practice under the FOIA: if a plaintiff draws a genuine issue with an agency's affidavits, courts generally require the agency to file more specific affidavits to attempt to resolve the issue. As noted above, courts are extremely reluctant to take FOIA cases beyond summary procedures and have never done so in national security cases. Of course, as the House Intelligence Committee Report makes clear, if the Agency fails to carry its initial burden of proof under subparagraph (A), the court can order a search forthwith without moving on to the subparagraph (B) procedures.

Paragraph (5) provides: "in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure except that requests for admission may be made pursuant to rules 26 and 36." As already noted, this limits the use of discovery only with respect to issues arising under paragraphs (3) and (4). Thus, Mr. Westreich's repeated assertions that plaintiffs are deprived of discovery to enforce any of the bill's provisions is a mistaken exaggeration.

The House Intelligence Committee Report states that paragraph (5) "does not address access by the court to information" and "does not prevent the complainant from proposing to the court matters on which the complainant believes the court should

itself seek information from the CIA to decide issues in the lawsuit." As a practical matter, detailed information concerning the function and content of the CIA's files will itself be classified, and therefore plaintiffs will not have access to such information and will have to rely on the court's in camera evaluation of the CIA's submissions. Thus, this restriction on discovery does not deprive plaintiffs of information they can realistically obtain.

Paragraph (6) provides: "if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision on this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section." This provision is intended to insure that if a court finds that the CIA has violated any provision of H.R. 5164, the court can only order the search and review of responsive records and the release of records which do not fall within the FOIA's exemptions. Under this provision, the court cannot order the CIA to reorganize its file system, as the CIA paranoically feared might happen. Mr. Westreich contends that this provision prohibits a court from imposing sanctions for the CIA's misconduct in litigation. The House Intelligence Committee Report squarely contradicts this assertion by stating that "[t]his provision, of course, does not affect the court's authority under the Freedom of Information Act to assess reasonable attorneys fees, to punish for contempt, or to handle other, similar ancillary matters."

Paragraph (7) provides "if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint." This provision merely enables the CIA to moot challenges of noncompliance with H.R. 5164 by agreeing to process an FOIA request without regard to the exemption for operational files. In some cases this is likely to be an attractive alternative to litigation, and Mr. Westreich has not objected to this paragraph.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Central Intelligence Agency Information Act".

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE VII—PROTECTION OF OPERATIONAL FILES OF THE CENTRAL INTELLIGENCE AGENCY

"EXEMPTION OF CERTAIN OPERATIONAL FILES FROM SEARCH, REVIEW, PUBLICATION, OR DISCLOSURE

"SEC. 701. (a) Operational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of title 5, United States Code (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

"(b) For the purposes of this title, the term 'operational files' means—

"(1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

"(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

"(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

except that files which are the sole repository of disseminated intelligence are not operational files.

"(c) Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

"(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act) or section 552a of title 5, United States Code (Privacy Act of 1974);

"(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act); or

"(3) the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

"(d)(1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

"(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

"(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

"(e) The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of subsection (a), and which specifically cites and repeals or modifies its provisions.

"(f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act) alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that—

"(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;

"(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

"(3) when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

"(4)(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational file likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

"(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

"(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

"(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

"(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

"DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

"SEC. 702. (a) Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) of section 701 of this Act to determine whether such exemptions may be removed from any category of exempted operational files or any portion thereof.

"(b) The review required by subsection (a) of this section shall include consideration of the historical value or other public interest in the subject matter

change: the sending exempted file remains exempted from search and review. Therefore, under paragraphs 701(d)(1) and (2), the flow of records and information from a file which is exempted to a file which is not exempted has no effect on the exempted/nonexempted status of the two files.

Paragraph 701(d)(3) concerns the CIA practice of using marker references, referred to as "dummy copies," in the dissemination of particularly sensitive records from operational files. In this process, the sensitive record is taken from the operational file to the intended temporary recipient, who reads it and returns it to the operational file for exclusive storage. A marker reference (usually a single piece of paper containing a brief description of the subject of the record and indicating where the record is stored) is placed in the file of the temporary recipient. If not for security constraints, a copy of the record would have been retained in the recipient's files, but because the record is so sensitive, only the marker reference from which one could locate the record is maintained in the recipient's file. Paragraph 701(d)(3) is designed to ensure that marker references are treated as if they were in fact the records they represent, in the sense that the record would have been subject to search and review if it were located in the nonexempted file where the marker reference is located. As a result of this provision, when CIA is searching a non-exempted file for records responsive to an FOIA request and locates a marker reference which substitutes for a record in an exempted operational file which may be responsive, the CIA must retrieve the record from the exempted operational file and process it in response to the FOIA request.

The market reference practice is of particular importance given its use in some circumstances in the Executive Registry of the CIA, which serves the Director of Central Intelligence, the Deputy Director of Central Intelligence and the CIA Executive Director. Under H.R. 5164 all records contained in the Executive Registry, and all records referenced in the Executive Registry by marker references, will remain subject to FOIA search and review requirements.

Subsection 701(c): Construction against implied repealer or modification

Subsection 701(c) provides that subsection 701(a), which grants authority to exempt operational files (as defined in the bill) from the FOIA process, can be superseded only by a subsequent statute which specifically cites and repeals or modifies it. Although no Congress and President can enact a statute which a subsequent Congress and President cannot repeal or modify by another statute, subsection 701(c) makes clear that, absent a clear, express statutory statement, repeal or modification of subsection 701(a) shall not be inferred from a subsequent statute:

Subsection 701(f): Judicial review

Subsection 701(f) provides for a *de novo* substantive standard of judicial review of CIA compliance with section 701 within a precisely defined procedural framework, ensuring both protection for sensitive CIA information and effective judicial review. The Committee concludes with respect to CIA action under H.R. 5164, as did the Congress in enacting the FOIA in 1966 and amending it in 1974 with respect to all executive agencies, that *de novo* judicial review is essential to ensure effective CIA implementation of the Freedom of Information Act and to maintain public confidence in the implementation of the Act. Subsection 701(f) ensures effective judicial review by providing that allegations that CIA has improperly withheld records because of failure to comply with section 701 shall be reviewed in accordance with subparagraph 552(a)(4)(B) of title 5, which is the judicial review provisions of the FOIA providing for *de novo* review, subject to seven procedural exceptions set forth in subsection 701(f). Thus, by virtue of subsection 701(f), CIA action to implement section 701 will be subject to judicial review in the same manner as CIA action to judicial review currently, except to the extent that paragraphs 701(f)(1) through (7) provide specific procedural rules. Matters not addressed by paragraphs 701(f)(1) through (7) will continue to be decided in accordance with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience. Nothing in H.R. 5[redacted] in any way affects the law of evidence.

Paragraph 701(f)(1) provides that classified information filed with, or produced for, the courts by the Central Intelligence Agency shall be examined *ex parte, in camera* by the court. The requirement that only the judge, and not the complainant, the complainant's counsel, or court personnel, may see the classified information is generally consistent with current practice under the FOIA. However, because issues arising under H.R. 5164 will be considered in the context of CIA's most sensitive operational files, the Committee believed it appropriate to provide expressly in statute that classified information involved in judicial review of CIA action under H.R. 5164 is for the judge's eyes only. Of course, in some FOIA cases CIA submissions may not be classified.

Paragraph 701(f)(2) provides that the courts shall, to the fullest extent practicable, determine issues of fact based on the sworn written submissions of the parties, when dealing with issues arising from CIA implementation of section 701. This provision also is generally consistent with current practice under the Freedom of Information Act in handling national security-related issues. However, because issues arising under section 701 will be considered in the context of CIA's most sensitive operational files, the Committee believed it important to make this rule explicit in statute.

While the Committee believes that a review of the sworn written submissions of the parties will generally be sufficient to enable a court to determine whether the CIA has improperly withheld records, cases will arise in which a court will find it impracticable to decide such issues based on sworn written submissions. Paragraph 701(f)(2) does not place obstacles in the path of the court in obtaining information it needs to decide these issues. Thus, when necessary to decision, the court may go beyond sworn written submission to require the Agency to produce additional information, such as live testimony, or the court may examine the contents of operational files. As an example, if the propriety of the exemption of an operational file is properly drawn into question under paragraph 701(f)(4), and the court concludes after considering the various sworn written submissions of the parties that it is necessary to decision that the court examine the contents of the operational file, the court may do so. In such a case, the scope of

the court's examination would be coextensive with what is necessary to the decision of the issue; it would not necessarily be limited to examination of the records requested by the FOIA requester, although it may be if the court concludes that examination of those records is all that is necessary to decision.

Paragraph 701(f)(3) provides that when alleging that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission based upon personal knowledge or otherwise admissible evidence. The "personal knowledge or otherwise admissible evidence" basis for the sworn written submission is similar to that required for submissions under Rule 56(e) of the Federal Rules of Civil Procedure. A complainant making an allegation of improper placement of a record argues that if the records requested were properly filed where they should be filed, they would be outside exempted operational files and would therefore be subject to the search, review and disclosure requirements of the FOIA. Determining the truth of such an allegation for purposes of defending in litigation may in practice require the CIA to search exempted operational files to see if responsive records are located there and to determine whether they are properly or improperly filed there. Since one of the basic purposes of H.R. 5164 is to remove from the CIA precisely this burden of searching exempted operational files, the Committee believed that the CIA should not be forced by a mere allegation of improper filing into a position of having to search exempted operational files to defend a lawsuit. Accordingly, a complainant alleging that requested records were impropery withheld because of improper placement of records solely in exempted operational files must support such an allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence. When such an allegation of improper placement of records is supported by such a submission based upon personal knowledge or otherwise admissible evidence, the CIA must answer and defend against the allegation. In responding to the complainant's submission, the CIA may, of course, challenge its factual basis.

Paragraph 701(f)(4) provides for determination of an allegation by a complainant that CIA improperly withheld requested records because of improper exemption of operational files. Under subparagraph 701(f)(4)(A), when such an allegation is made the CIA must meet its burden to sustain its action by demonstrating to the court's satisfaction by sworn written submission that the exempted operational files likely to contain responsive records currently perform the functions set forth in subsection 701(b), which defines "operational files" by function. Subparagraph 701(f)(4)(B) makes clear that if the complainant thereafter files a sworn written submission genuinely disputing the CIA's submission concerning the functions of the files, the court may in its discretion order the CIA to review the contents of operational files in connection with determination of the issue of improper exemption of the operational files. Of course, if the CIA fails to sustain its burden to demonstrate the propriety of the exemptions of the files in issue due to the insufficiency of its sworn written submissions and any other submitted information, the court will, under paragraph 701(f)(6), order the CIA to search such files for responsive records, and the reference in subparagraph 701(f)(4)(B) to a complainant's submission would be inapplicable. By virtue of subsection 701(f)(4), the CIA will not be forced into the position of searching and reviewing the contents of operational files to defend the lawsuit by a mere allegation of improper exemption of the files, which would be inconsistent with one of the basic purposes of the bill, which is to relieve the CIA of an undue burden of searching and reviewing operational files. The Committee notes that subparagraph 701(f)(4)(B) does not diminish the court's authority to review the contents of operational files likely to contain responsive records, if the written submissions are inadequate and such a review is necessary to decide the issue presented, as described above in the explanation of paragraph 701(f)(2).

Paragraph 701(f)(5) restricts discovery by the parties in connection with proceedings to determining allegations of improper placement of records solely in operational files or of improper exemption of operational files. The provision prohibits discovery, except for requests for admission, related to these two issues. The Committee believed it important to prohibit discovery by a complainant with respect to these issues because they involve the most sensitive of CIA operational files and because of the potential damage which could ensue from CIA errors in responding to discovery requests concerning these files. Since the Committee believed it necessary to prohibit discovery by a complainant from the CIA, the Committee imposed a reciprocal prohibition on discovery by the CIA from a complainant as a matter of fundamental fairness. The provision permits requests for admission, unlike other discovery devices such as depositions or interrogatories, because use of requests for admission presents little risk of compromise of secrets. The specific provision concerning the issue of discovery in the context of the issues of improper placement of records and improper exemption of files is not intended to carry a negative implication that discovery on other issues is to be either especially encouraged or discouraged in any manner by this subsection. The question of discovery with respect to other issues shall continue to be governed by the practices developed by the courts under the judicial review provision of the Freedom of Information Act (5 U.S.C. 552(a)(4)(B)). The Committee emphasizes that paragraph 701(f)(5) addresses discovery by the parties in accordance with the Federal Rules of Civil Procedure; this provision does not address access by the court to information. Furthermore, the provision does not prevent the complainant from proposing to the court matters on which the complainant believes the court should itself seek information from the CIA to decide issues in the lawsuit.

Paragraph 701(b)(6) provides the exclusive remedy for CIA failure to comply with section 701. If the court finds that the CIA has improperly withheld requested records because of failure to comply with any provision of section 701, the court shall order the CIA to search and review the appropriated exempted operational file or files for the requested records and to release the records, or portions thereof, which do not fall within any of the FOIA exemptions contained in subsection 552(b) of title 5, United States Code. Such an order is the exclusive remedy for CIA failure to comply with section 701. This provision, of course, does not affect the court's authority under the

Freedom of Information Act to assess reasonable attorney fees, to punish for contempt, or to handle other, similar ancillary matters.

Paragraph 701(b)(7) provides that, if the CIA agrees at any time after the filing of a complaint alleging CIA failure to comply with section 701 to search the appropriate exempted operational files for the requested records and process the records under the FOIA, the court shall dismiss claims based upon failure to comply with section 701. Thus, by agreeing to process an FOIA request for records without regard to the exemption of operational files, the CIA can obtain dismissal of claims challenging its compliance with section 701.

Section 703: Decennial Review of Exempted Operational Files

Section 702 provides for a periodic review of the exemptions of operational files to determine whether the exemptions may be removed with respect to such files or significant portions thereof.

Subsection 702(a) requires the Director of Central Intelligence to review the exemptions of operational files in force under subsection 701(a) at least once every ten years to determine whether such exemptions may be removed from exempted files or any portion thereof. The phrase "or any portion thereof" provides for potential removal of exemptions from an individual collection of records which forms a portion of an exempted operational file. The phrase contemplates, for example, potential removal of an exemption with respect to a collection of records concerning a specific intelligence operation, even though the collection is contained in a larger exempted operational file which continues to merit exemption. The phrase does not require the review and potential removal of exemption with respect to individual records contained in exempted operational files. Those files, or portions thereof, with respect to which exemptions are removed, become subject once again to the search, review, and disclosure requirements of the FOIA.

Subsection 702(b) requires that, in conducting the review of exemptions mandated by subsection 702(a), the Director of Central Intelligence shall consider the historical value or other public interest in the subject matter of the particular files or portions thereof and the potential for declassifying a significant part of the information contained therein. In applying the historical value criterion, the Director of Central Intelligence should consult with, and take into account, the recommendations of the historical staff of the Departments of State and Defense, the Archivist of the United States, and appropriate historians from the private sector. In applying the public interest criterion, the Director of Central Intelligence should consider the contribution materials would make to an understanding of intelligence, foreign policy, and international developments and should consider interest in specific topics expressed by the journalistic and academic professions. In applying the potential-for-declassification criterion, the Director of Central Intelligence should consider factors such as the sensitivity of operations, the possibility of damaging foreign relations or jeopardizing intelligence sources and methods, and the passage of time.

Subsection 702(c) provides for limited judicial review of CIA compliance with section 702. Since this review does not arise under the judicial review section of the FOIA, subsection 702(c) provides a separate grant of subject matter jurisdiction to the U.S. district courts and provides an independent venue provision. A complainant may obtain judicial review upon allegation that the CIA has improperly withheld records because of failure to comply with section 702. However, unlike allegations in a complaint of improper withholding for failure to comply with section 701, which will be reviewed under the judicial review provision of the FOIA (5 U.S.C. 552) and the procedures provided in section 701(f), the allegation of improper withholding of records for noncompliance with section 702 will be reviewed in accordance with the more limited judicial review provision contained in subsection 702(c). The court's review of CIA compliance with section 702 is limited to determining whether the review of exemptions of operational files required by subsection 702(a) has been conducted within the time period prescribed by that section and whether the criteria set forth in subsection 702(b) were in fact considered in the review of exemptions.

Should the court find that the review required by subsection 702(a) has not been conducted or that the criteria set forth in subsection 702(b) were not considered in the review, the court may, as appropriate, order the CIA: (1) to search and review the appropriate exempted operational file or files for the requested records and to release the records, or portions thereof, which do not fall within any of the FOIA exemptions; (2) to conduct the review required by subsection 702(a); or (3) to consider the criteria set forth in subsection 702(b) when conducting the review of appropriate exempted operational files for the requested records. These are the exclusive remedies for failure to comply with section 702.

SECTION 3 OF H.R. 5164: REPORT TO CONGRESS

Section 3 of the bill requires the Director of Central Intelligence to report by June 1, 1985 to the intelligence committees of the Congress on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value. In preparing this report, the Director shall consult with the Archivist of the United States, the Librarian of Congress, and appropriate historians selected by the Archivist of the United States.

The Committee expects the Director's report to explore the full range of ideas which can contribute to the objective of making available CIA information of historical value on the diplomatic, military, and intelligence activities of the United States without risking damage to the security or foreign policy of the Nation. The Committee considers the Foreign Relations of the United States series published by the Department of State to be an excellent example of a project which contributes to this objective. Because of the especially sensitive nature of the work of the CIA, this type of large-scale chronological disclosure of CIA information of historical value may not be possible. However, the Committee expects the report of the Director of Central Intelligence to explore this possibility on some appropriate scale, along with exploring other ideas which can contribute to the objective set forth above.

Section 3 is intended to require the Director of Central Intelligence to study the feasibility of a declassification program which would sup-

Center for National Security Studies

M E M O R A N D U M

September 12, 1984

TO: Mort Halperin and Ira Glasser

FROM: Allan Adler

RE: Memorandum By James H. Lesar Regarding H.R. 5164

This memorandum responds to statements made by James Lesar in his September 6, 1984 memorandum regarding H.R.5164. Insofar as Mr. Lesar's memorandum addresses the provisions in H.R.5164 that specifically concern judicial review, reference should be made to Mark Lynch's September 7, 1984 memorandum in response to similar statements in memoranda by Meir Westreich. Mr. Lesar's other salient statements regarding H.R.5164 are addressed as follows:

Mr. Lesar: "Because H.R.5164 neither limits how long the CIA may impose secrecy on its 'operational' files nor guards against their destruction, scholars may never be allowed access to many of the most important materials documenting CIA activities."

Response: H.R.5164 concerns whether the CIA must search and review certain "operational" files, not whether the agency must permit public access to materials within them. The CIA already has the authority to "impose secrecy" on its "operational" files because most of the materials within them invariably fall within FOIA exemptions that authorize the agency to withhold classified information and information about intelligence sources and methods. Neither Executive Order 12356 -- which is the basis for classification resulting in withholding pursuant to exemption 1 -- nor section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. Sec.403(d)(3) -- which is the basis for invoking exemption 3 to prevent unauthorized disclosure of intelligence sources and methods -- prescribes limits on how long such materials can be kept secret. Indeed, regarding duration of classification, Section 1.4(a) of the Executive Order simply states that "[i]nformation shall be classified as long as required by national security considerations." While it is therefore true that "scholars may never be allowed access" to such materials, this would not be attributable to H.R.5164 because its provisions do not create any additional authority to deny access.

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With respect to destruction of files, the CIA, like other federal agencies, is already required to comply with provisions in Chapters 31 and 33 of Title 44 regarding records management and disposal. Failure to comply with these laws in connection with destruction of its records led to the FBI being enjoined from further destruction pending court approval of a program meeting the statutory requirements. American Friends Service Committee v. Webster, 485 F.Supp. 222 (D.D.C. 1980). Moreover, it seems unlikely that the CIA would need to destroy records in order to deny public access to them; they have been exceedingly successful in utilizing the withholding authority presently available to them by law.

Mr. Lesar: "H.R.5164 may set a precedent that will allow still other agencies to obtain similar exemptions from the Freedom of Information Act."

Response: It is highly improbable that H.R.5164 would become a model for similar legislation to provide FOIA "relief" for any other federal agency, primarily because it is so specifically tailored to the administrative problems arising from the CIA's compartmented filing system. In an exchange with Rep. Kleczka during the House Government Operations subcommittee hearing on H.R.5164 in May, the Deputy Director of the CIA's Office of Legislative Liasion explained that the CIA had discussed FOIA problems with other intelligence agencies and "found, after extensive discussion, examination of their system, that their problems were different and although they certainly do have problems with the FOIA, it was not fixable in the way we do it here." CIA Information Act: Hearing on H.R.5164 Before A Subcommittee of the House Committee on Government Operations, 98th Cong., 2d Sess. 33-34 (1984).

Moreover, the CIA itself told the Senate Intelligence Committee that there was no "hidden agenda" for other intelligence agencies to seek further FOIA "relief" following enactment of the CIA legislation. This was reflected in the committee report in the "Additional Views of Senators Durenberger, Huddleston, Inouye, and Leahy" -- the four senators who successfully fought for committee amendments to protect the public's right of access in the context of this legislation:

> "As important as the bill, the report, and related assurances and commitments is the prospect that passage of the Intelligence Information Act will make it unnecessary for the Congress to consider further requests for broader exemptions from the FOIA for intelligence records. Deputy Director of Central Intelligence John N. McMahon testified at

the hearings on S.1324 that proposals for broader intelligence exemptions from the FOIA 'would not be sanctioned' by the Administration. The Committee report cites the Chairman's communication with the President in which the President indicated his support for the approach taken in S.1324. Thus, we do not envision a need for further legislation in this area for the foreseeable future." S.Rpt. 98-305, p.40.

Agencies, such as the FBI, which have long sought FOIA "relief" from Congress will undoubtedly continue to do so regardless of the fate of H.R.5164. Whether Congress will be disposed to provide requested "relief" will depend upon the merits of the request, not upon any "precedent" purportedly set by action on H.R.5164.

Mr. Lesar: "H.R.5164 has sped through Congress on greased skids... Scant public attention has been given the bill, perhaps in part due to an assumption that the ACLU's position fully and adequately represents the interest of all segments of the public."

Response: There is nothing out of the ordinary with respect to the legislative progress of H.R.5164. Its predecessor in concept, S.1324, was the subject of two days of hearings in June 1983 before the Senate Intelligence Committee. S.1324, An Amendment to the National Security Act of 1947: Hearings Before the Senate Select Committee on Intelligence, 98th Cong., 1st Sess. (1983). With substantial modifications, the Committee approved the bill in October 1983 and filed a detailed report (H.Rpt. 98-305) explaining its intent. S.1324 was passed by voice vote in the Senate on November 17, 1983. In February of this year, the House Intelligence Committee held a hearing to consider similar legislation which had been introduced in June 1983. Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency: Hearing Before the Subcomm. on Legislation of the House Permanent Select Committee on Intelligence, 98th Cong., 2d Sess. (1984). Following extensive modifications, the Committee approved H.R.5164 as a clean bill in April of this year and filed an explanatory report (H.Rpt. 98-726, Part 1) in May. The House Government Operations Subcommittee on Government Information, Justice and Agriculture -- which had joint jurisdiction over H.R.5164 with the Intelligence Committee -- held a hearing on the bill on May 10. (See CIA Information Act: Hearing, supra). With further amendment, H.R.5164 was subsequently approved by the full House Government Operations Committee, which filed its report (H.Rpt. 98-726, Part 2) last week.

Numerous interested parties in addition to the ACLU and the CIA made their views known during the course of this legislative process. If, as Mr. Lesar asserts, some parties assumed that the ACLU's position represented the interests of all segments of the public, this was an unfortunate assumption which was neither fostered nor desired by the ACLU. ACLU legislative staff in Washington both sought and accepted any available opportunity to discuss the legislation with interested parties, particularly those who expressed criticism of our public statements on the bill. Indeed, ACLU legislative staff met in January of this year with Mr. Lesar and one of his clients in an FOIA/CIA suit to discuss upcoming consideration of the legislation by the House committees.

Several articles tracking the progress of the legislation and the accompanying debate appeared in The New York Times, The Washington Post, and other major papers. Indeed, a running debate over the merits of the legislation as viewed by the ACLU and others played across the pages of several issues of The Nation magazine. In addition, meetings were held in New York and Washington to permit representatives of various organizations to discuss the legislation with ACLU staff. Documents previously released by the CIA under the FOIA were solicited by the ACLU to determine what impact the proposed legislation would have on the same materials.

In short, it is difficult to understand what more Mr. Lesar would have wanted done to encourage public attention regarding H.R.5164.

Mr. Lesar: "Each of [the CIA components containing "operational files"] is known to have engaged in illegal and reprehensible activities."

Response: This, of course, is well-known to the ACLU, which has litigated many of the FOIA cases that revealed the details of such activities. However, past illegal conduct by the CIA is not an argument against enactment of H.R.5164; rather, it is an argument in support of the ACLU's successful effort to insure judicial review and Congressional oversight with respect to the CIA's actions and commitments regarding its FOIA processing if H.R.5164 is enacted.

Moreover, H.R.5164 would not facilitate any effort on the part of the CIA to hide records which document illegal activities because, as the report of the House Intelligence Committee explains, paragraph 701(c)(3) of the bill "ensures that operational files will remain subject to FOIA search and review requirements for information concerning the specific subject

matter of an investigation for any impropriety or illegality in the conduct of an intelligence activity. Thus, such information will remain fully subject to FOIA search, review, and disclosure requirements in the same manner as if subsection 701(a) [exempting certain files from search and review] were never enacted. H.Rpt. 98-726, Part 1, p.28.

The committee report explains that allegations of impropriety or illegality in the conduct of an intelligence activity "may originate either inside or outside" the CIA; allegations which arise inside the CIA "are never dismissed without some recorded inquiry." Allegations made by persons outside the Agency "will be deemed frivolous and closed without any investigation only where the writer has sent previous letters and the allegation is preposterous on its face; if CIA's records reflect that the Agency has had contact with the individual making the allegation and the individual is not a prior correspondent of known frivolity, the allegation is never determined to be frivolous." Id. at 28-29.

Mr. Lesar: With regard to the "investigation" exception to the operational files exemption, i.e., paragraph 701(c)(3), "[t]here is no mention of Presidential commissions, and as it pertains to Congress, the list is restricted to 'the intelligence committees of Congress' only. The investigations of the Rockefeller Commission and the House Select Committee on Assassinations do not come within the purview of this exception. Nor would the investigation of the Patman Committee into the laundering of funds in the Watergate scandal be included."

Response: The absence of specific mention of the investigative bodies cited by Mr. Lesar does not present serious problems because these bodies, like any other person inside or outside of the CIA, can trigger an investigation by one of the listed investigative bodies and thereby still make operational files concerning the specific subject matter of such investigation undergo full search and review pursuant to an FOIA request. See H.Rpt. 98-726, Part 1, p.28-31. Whether such investigations turn out to be "cover-up type inquiries" as suggested by Mr. Lesar will not affect the CIA's obligation to search for documents which concern the specific subject matter of an investigation, no matter how shoddy the investigation may be.

Mr. Lesar: Problems with the meaning of "specific subject matter of an investigation", "impropriety", and "intelligence activity".

Response: These terms and phrases are explained in detail in the report of the House Intelligence Committee cited immediately above. Mr. Lesar offers no valid illustration in support of his contention that the report language is inadequate. Moreover, any dispute over interpretations can be pursued in court where agency actions will remain subject to de novo judicial review in accordance with current FOIA law. See H.Rpt. 98-726, Part 1, p.33 ("Matters not addressed by [the bill's seven procedural exceptions to de novo review] will continue to be decided in accordance with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience.")

Mr. Lesar: With respect to Section 701(c)(3), "this proviso fails to provide historians, journalists and scholars with access to operational files which do not involve illegality or impropriety, but which nonetheless document activities of interest to the public."

Response: True, but they do not obtain such access under current law. As Mr. Lesar himself notes, the "balancing test" of President Carter's Executive Order 12065 is no longer available and was unavailing even when it was law. See Afshar v. Department of State, 702 F.2d 1125 (D.C.Cir. 1983). Still, as noted in both House committee reports, H.R.5164 will not affect the CIA's obligation to search and review (1) all intelligence disseminations, including raw intelligence reports direct from the field; (2) all matters of policy formulated at Agency executive levels, even operational policy; (3) information concerning those covert actions the existence of which is no longer classified; (4) information concerning U.S. citizens and permanent resident aliens requested by such individuals about themselves; and, (5) information concerning any Agency intelligence activity that was improper or illegal or that was the subject of an investigation for alleged illegality or impropriety.

Mr. Lesar: "Review Every Ten Years, Release Never... any public benefit to be gained from [Section 702 on Decennial Review of Exempted Operational Files"] depends on a profound change in the CIA's own attitudes and practices..."

Response: H.R.5164 does nothing to diminish the historical value review that is required pursuant to Title 44, nor does it weaken the declassification review available pursuant to Executive Order 12356. Insofar as CIA will perform its responsibilities to scholars and historians, only dedicated Congressional oversight can make a true difference. Commitment

toward that goal is repeated throughout the legislative history of H.R.5164. It will be up to the press and the public to see that Congress lives up to its promise of oversight.

Mr. Lesar: "Recent events do not suggest that the CIA is worthy or the trust H.R.5164 exudes."

Response: Again, H.R.5164 does not depend upon trusting the CIA; this is precisely why the ACLU insisted upon judicial review and Congressional oversight to make H.R. 5164 work.

Mr. Lesar: Is CIA Backlog Self-Created?

Response: It is true, as Mr. Lesar notes, that the CIA has often employed an "arsenal of obstructionist tactics to delay and impede access to information." Nevertheless, the congressional committees that considered this legislation examined the CIA's filing and FOIA processing systems and found the CIA's explanation of its backlog credible, as have most of the courts.

Mr. Lesar: Will H.R.5164 result in a loss of meaningful information?

Response: Mr. Lesar's suggestion that "fundamental issues regarding the exemption claims [CIA] primarily relies upon have yet to be definitively resolved" is wholly untenable. A review of decisions by the U.S. Court of Appeals for the D.C. Circuit indicates that the parameters of CIA authority to withhold information requested under the FOIA are well-established indeed. See, e.g., Miller v. Casey, 730 F.2d 773 (D.C.Cir. 1984); Gardels v. CIA, 689 F.2d 1100 (D.C.Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724 (D.C.Cir. 1981); Allen v. CIA, 636 F.2d 1287 (D.C.Cir. 1980); Halperin v. CIA, 629 F.2d 144 (D.C.Cir. 1980); Ray v. Turner, 587 F.2d 1187 (D.C.Cir. 1978).

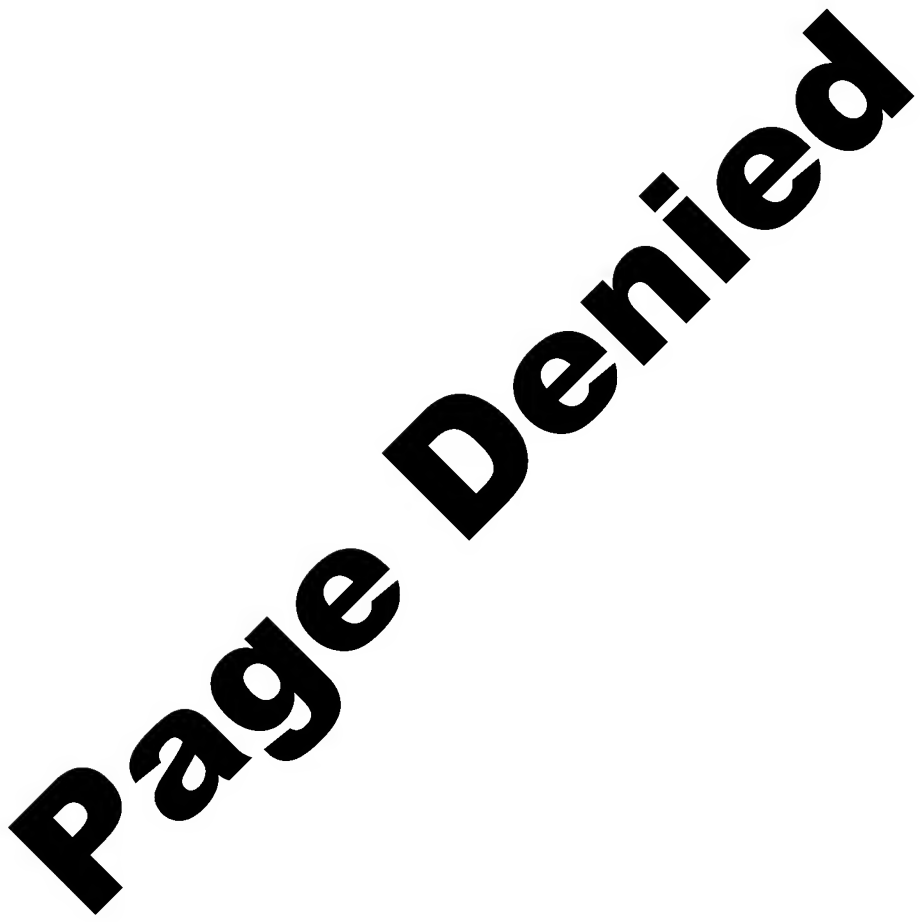
Moreover, the notion that the federal courts are soon to favor FOIA requesters with narrow interpretations of the exemptions relied upon by the CIA makes no sense in light of Mr. Lesar's statement that "[t]o anyone familiar with the CIA's Freedom of Information Act track record and the timidity of federal judges confronted with the task of evaluating claims that disclosure will jeopardize national security, it is virtually certain that [the judicial review provisions of H.R.5164] will ultimately prove to be meaningless." Indeed, a chronological review of the decisions of the U.S. Court of Appeals for the D.C. Circuit cited above indicates that a clear trend toward greater, rather than

lesser, judicial deference toward CIA claims continues to this day and will probably expand under President Reagan's conservative judicial appointees. Only the active and willing involvement of Congress in performing oversight of the CIA's FOIA operations, pursuant to a thorough understanding of those operations, offers hope of improved response to FOIA requesters. This has been made possible for the first time by process leading to enactment of H.R.5164.

Finally, with reference to David Sobel's example of information lost in the context of Vaughn indices, it would be disingenuous to insist that this was not a rare exception to the typical FOIA requester's experience with "boilerplate" CIA indices that are virtually indistinguishable on a case-to-case basis. Conceding that cases like Sobel's can arise, we nevertheless believe that improved processing of FOIA requests, together with the commitment for informed Congressional oversight, is much more important than marginal scraps of information produced as a byproduct of litigation over such requests.

Mr. Lesar: "The failure to include a provision for attorney's fees [in H.R.5164] is simply astounding... Without an attorney's fees provision, this bill is unenforceable."

Response: An attorney fees provision was not included in H.R.5164 for the simple reason that the attorney fees provision in the FOIA, Section 552(a)(4)(E), is fully applicable to actions involving the provisions of H.R.5164. The report of the House Intelligence Committee makes clear that paragraph 701(f)(6), providing that a court order to search and review exempted operational files shall be the exclusive remedy for CIA failure to comply with the main provisions of H.R.5164, "of course, does not affect the court's authority under the Freedom of Information Act to assess reasonable attorney fees, to punish for contempt, or to handle other, similar ancillary matters." H.Rpt. 98-726, Part 1, p.35-36.



That this Act may be cited as the ''Central Intelligence Agency Information Act''.

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

''TITLE VII--PROTECTION OF OPERATIONAL FILES OF THE CENTRAL INTELLIGENCE AGENCY

''EXEMPTION OF CERTAIN OPERATIONAL FILES FROM SEARCH, REVIEW, PUBLICATION, OR DISCLOSURE

''SEC. 701. (a) Operational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of title 5, United States Code (Freedom of Information Act), which require publication or disclosure, or search or review in connection therewith.

''(b) For the purposes of this title the term 'operational files' means--

''(1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

''(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through

scientific and technical systems; and

''(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

except that files which are the sole repository of disseminated intelligence are not operational files.

''(c) Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning--

''(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act), or section 552a of title 5, United States Code (Privacy Act of 1974);

''(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act); or

''(3) the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector

General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

''(d)(1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

''(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

''(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

''(e) The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of subsection (a), and which specifically cites and repeals or modifies its provisions.

''(f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that--

''(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;

''(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

''(3) when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

''(4)(A) when a complainant alleges that requested

records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

''(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

''(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

''(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the

Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

''(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

''DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

''SEC. 702. (a) Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) of section 701 of this Act to determine whether such exemptions may be removed from any category of exempted operational files or any portion thereof.

''(b) The review required by subsection (a) of this section shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the

information contained therein.

''(c) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this section may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining (1) whether the Central Intelligence Agency has conducted the review required by subsection (a) of this section within ten years of enactment of this title or within ten years after the last review, and (2) whether the Central Intelligence Agency, in fact, considered the criteria set forth in subsection (b) of this section in conducting the required review.''.

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

''TITLE VII--PROTECTION OF OPERATIONAL FILES OF THE CENTRAL INTELLIGENCE AGENCY

''Sec. 701. Exemption of certain operational files from search, review, publication, or disclosure.
''Sec. 702. Decennial review of exempted operational files.''.

vacy Act (3)" endment ← (c) Subsection (q) of section 552a of title 5, United States Code, is amended--

(1) by inserting ''(1)'' after ''(q)''; and

(2) by adding at the end thereof the following:

''(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.''.

SEC. 3. (a) The Director of Central Intelligence, in consultation with the Archivist of the United States, the Librarian of Congress, and appropriate representatives of the historical discipline selected by the Archivist, shall prepare and submit by June 1, 1985, a report on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value.

(b)(1) and (b)(2) are the new reporting requirement amendments

(b)(1) The Director shall, once each six months, prepare and submit an unclassified report which includes--

(A) a description of the specific measures established by the Director to improve the processing of requests under section 552 of title 5, United States Code;

(B) the current budgetary and personnel allocations for such processing;

(C) the number of such requests (i) received and processed during the preceding six months, and (ii) pending at the time of issuance of such report; and

(D) an estimate of the current average response time for completing the processing of such requests.

(2) The first report required by paragraph (1) shall be submitted a date which is six months after the date of enactment of this Act. The requirements of such paragraph shall cease to apply after the issuance of the fourth such report.

(c) Each of the reports required by subsections (a) and (b) shall be submitted to the Permanent Select Committee on Intelligence and the Committee on Government Operations of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

SEC. 4. The amendments made by subsections (a) and (b) of section 2 shall be effective upon enactment of this Act and shall apply with respect to any requests for records, whether or not such request was made prior to such enactment, and shall apply to all civil actions not commenced prior to February 7, 1984.